

# This is not a drill

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Maximilian Steinbeis Fr 7 Feb  
2020

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Four years ago, in the cursed year 2016, when first the Brexit referendum and then the Trump election shook the liberal democratic basic trust in the reasonableness of the world to the core, I experienced with an almost physical intensity a sensation after each of those events which I hadn't known before: It's incomprehensible. It defies logic. It doesn't add up, it's in nobody's interest, it doesn't make any sense at all. And yet it happens. I felt that in my knees and in my stomach and in my head.

That sensation returned last Wednesday. In the placid central German state of Thuringia, the regional leader of the liberal FDP (which in the elections had barely managed to get into the state parliament with 5,0005% of the votes), had been elected Prime Minister with the votes of the FDP, the CDU and the far-right AfD. The guy was elected in a perfectly legal, constitutional, democratic way to wield executive power over the state of Thuringia and determines the guidelines of all its government policy. He was elected by a coalition which includes a party led by a fellow whom the leader of the Thuringian CDU himself had called a Nazi. He had absolutely no way to form a viable government, and the whole stunt fell apart only 24 hours later with the barely elected Prime Minister stepping down again in disgrace. But nevertheless: it had happened. It had happened. Because the AfD wanted it that way.

Why did they do that? What for? What were they trying to achieve? Nobody seems to be able to give an even remotely convincing answer to this question (least of all those who equate the previous PM, the popular former union man and left-wing moderate Bodo Ramelow, with left wing extremism in order to justify their voting along with right-wing extremists, a pitifully transpicuous and futile rationalisation attempt.) Obviously there are some in the Thuringian CDU who regard the AfD as pretty much the party they would wish their own CDU to be anyway – but that doesn't explain why all CDU MPs voted as they did. Some tried to sugarcoat the news with words like "adventure" and "departure into the unknown", as if this were all just an Enid Blyton novel. Others search for the solution to the riddle in the stupidity of the Thuringian CDU and FDP politicians involved: To sit on this open and actually not all that terribly cleverly built trap of the AfD with their whole broad butt as if it were a sofa – what in Christ's name were they thinking! Surely they must have lost their marbles. To pathologize the whole thing off is certainly a popular, if not very effective coping strategy.

In 2016, when 17 million Brits voted for Brexit, it was not a decision of reason. These were not people who said: All things considered, it's better for us and for me if we quit. On the contrary, people knew very well that they would be worse off. But they didn't care. Even more: they cherished it. There was a moment of collective self-empowerment coming with it, to do no longer what *one should do* according to reason and self-interest,

but what *one wants to do*. That was the great temptation, and some 17 million people, led by a tousle-haired, notoriously lying buffoon and in their vast majority feeling powerless and surrounded by constitutional and human rights demands for reasonable justification, enthusiastically fell for it.

With Trump it was pretty much the same.

I don't mean to equate this Thuringia thing with Trump and Brexit, of course. But perhaps this is the explanation why CDU and FDP did the inexplicable: Maybe they felt that sulphurous, exciting whiff of pure decision in their noses, too. The self-empowerment of saying: Hell, let's just do this! Let's make this baldy fellow with his five-percent party Prime Minister! Just because we can! This is what gets the inner Porsche engine roaring for the typical FDP guy, and for a large part of the CDU apparently as well.

Whatever happens now to this 24-hour Prime Minister and his pathetic stunt, one fact will remain – the just-because-we-can party AfD will be able to say from now on: Look, not only have you voted with us. Not only did you accept the election. No, more than that: you are like us. You want this decisionist kick just as much as we do. Inside each one of you there is a little AfD guy who wants out. Just doesn't dare.

And they'll be right.

The louder the Porsche engine, the harder the crash barrier, and a totalled car is usually not the only damage on the scene: That FDP fellow (no need to remember his name) at least managed to make his mark in the annals of the state of Thuringia by dismissing all the ministers of the previous government without replacing them. This means that there are no ministers in the Thuringian government for the time being. (*Staatsexamen* candidates, watch out: if I were your examiner, I would ask how this affects the second chamber of Parliament, the *Bundesrat*. Will Thuringia's four seats now remain empty until the election of a new government? Only members of the state government can represent their state in the *Bundesrat* (Article 51 I Grundgesetz), and only ministers are members of the state government (Article 70 II Thuringian Constitution). That's correct, well done! But what about that FDP fellow? Discuss!)

Now, to make the chaos complete, even that is not certain. MICHAEL MEIER and ROBERT WILLE have taken a close look at the norms in question and come to the conclusion that the ministers of the former left-wing government may legally still be in office as care-takers, even if they aren't aware of it. x

## USA, Germany

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Speaking of car wrecks: In the USA, the impeachment proceedings against President Donald Trump have ended this week with an acquittal. MATTIAS KUMM spends half the year as a professor at NYU in New York and was kind enough to tell us at length how he assesses the situation. The Ukraine case, in his opinion, was probably unsuitable from the outset to build a consensus on where to draw the line of what is unacceptable from

the US president. The Republicans and their voters, to the extent that they did not find Trump's extortion methods just fine, did at any rate not consider it bad enough to overrule the democratic decision of the citizens in the election.

So here we are: there is no room for a quasi-legal procedure such as impeachment, by means of which the country ascertains its minimum standards beyond different political interests and preferences. If one side says that our man, as long as he is just our man, should be allowed to do what he wants, *just because he can* – then that is the negation of any possibility of a legal procedure. The only thing left to get rid of these people again is – if at all – the ballot box.

*Advertisement*



# Hertie School Centre for Fundamental Rights

## Launch Event

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The **Centre for Fundamental Rights at the Hertie School** warmly invites the readers of Verfassungsblog to attend the launch event of the Centre on **20 February 2020, 6 pm.**

Susanne Baer, Başak Çalı, Cathryn Costello and Patricia Sellers chaired by Arjun Appadurai will debate fundamental questions on fundamental rights – are they losing or gaining ground, or holding their own in this era of heightened contestation? Do they still provide a lingua franca for legitimate legal and political decision-making? Are current rights and accountability structures fit for the 21st century and the challenges it has brought?

Please register [online](#).

In Germany we have almost got used to the fact that a constitutional and functional right to vote is somehow out of reach for us. The current *Bundestag*, or to be more precise: the CDU/CSU faction seems to have come to the conclusion that it's okay to not have one for the next general elections in 2021, as if that were a matter of political utility. With all due urgency, SOPHIE SCHÖNBERGER calls on the parliament to acknowledge that keeping your own mandates safe is not a legitimate reason to block the electoral law reform forever.

## Poland

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So, now, with a sigh of relief after so much bad news, we turn to Poland, where... oh, wait.

The infamous "muzzle law" has been signed by President Duda this week and will now come into force next week. Then we'll see judges punished for simply doing their job, and not bowing to the "will of the people" usurped by the governing PiS party, in a way which was considered utterly inconceivable in the EU until very recently. Surely the EU Commission will not be so brazen as to regard the abolition of judicial independence in a member state a treaty violation? Or even, heaven forbid, request an injunction from the ECJ? Hush, my agitated soul: not the slightest word of disapproval has, as far as I know, crossed Ursula von der Leyen's lips yet.

Oh, and by the way: Since we all seem to agree that what occurred in Thuringia was "inexcusable" (Angela Merkel) and "unacceptable" (Markus Söder) – may I discreetly remind both that they still share a common party on the EU level with Viktor Orbán's Fidesz?

In any case, in Poland, the PiS government has let their Constitutional Court rottweiler out of the kennel after the Supreme Court's decision on the lack of ability of all judges appointed since March 2018 to administer justice independently. WITOLD ZONTEK reveals the background and ramifications of this conflict, and why the injunction of the Constitutional Court against the decision of the Supreme Court is going nowhere.

The PiS government, just like the Hungarian, loves nothing more than to throw its critics into confusion by pointing to supposed role models in supposedly impeccable democratic constitutional states. Marcin Wachoł, the deputy Minister of Justice, recently tried to do this with the Netherlands: There, too, a law was being drafted that would forbid judges to decide on political matters, he tweeted. Oh well, what are you going to do. Someone will have to take the trouble to debunk this nonsense, for whatever it's worth, right? In this case MARC DE WERD has thankfully taken over that job.

## Europe

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In Strasbourg, the Parliamentary Assembly of the Council of Europe (PACE) has now placed Poland on the list of countries whose rule of law standards require special monitoring. This is a list where you find Russia, Turkey and others, but an EU Member State is by all means a first. MARTEN BREUER analyses these and the other innovations adopted at the recent PACE meeting.

According to the plans of the EU Commission and the EU Parliament, the European Union in turn is to be revitalized by a "Conference on the Future of Europe". ALBERTO ALEMANNO, KALYPSO NICOLAIDIS and NICCOLÓ MILANESE consider the top-down approach implied to be an absolutely horrible idea and warn the Presidents of the Commission, Parliament and Council in an open letter signed by dozens of political and legal heavyweights in the most urgent way to drop it:

There is a tangible risk that by raising expectations it cannot easily deliver on, the Conference may erode citizens' trust at a time when the demand for public engagement is at record highs across the continent. Europe and your political leadership can hardly afford that.

UK is nominally no longer a member of the EU since last Saturday, while in fact the real Brexit is still to come. Boris Johnson's government and the right-wing jingoist press have made great efforts to convince themselves and the whole country that by the end of January 31st Brexit is indeed "done". The effort it takes to believe that probably contributed to dampen the public exuberance on Brexit Day. Our own EVIN DALKILIC was on the spot in London last weekend, and what she saw was anything but a country in a celebratory mood.

This week, we hosted what I think was a very exciting online symposium organised by Carolyn Moser and the MPI for Comparative Public Law and International Law in Heidelberg. It was about Frontex, the EU border protection agency and its rise to a key institution after the European flight and migration crisis in 2015/16. After the opening contribution by CAROLYN MOSER, SAMUEL HARTWIG, ELISABETH BADENHOOP, CATHARINA ZIEBRITZKY, FLORIN COMAN-KUND, again CAROLYN MOSER together with RABIA FERAH KAYA and LUKAS MÄRTIN as well as CONSTANTIN HRUSCHKA took part in the debate.

## Open access

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Exit, Voice, Loyalty: these are Albert Hirschman's classic three options for how to act in a situation of disagreement. A lot of people disagree with the conditions in scientific publishing, and it's not hard to see why: the important journals which you want to publish your research to get tenure and funding are often owned by global publishing behemoths nowadays, which don't care much about the functional logic of scientific research and all the more about the exorbitant profit margins that can be achieved by selling it back to the very research community which produced it in the first place.

Back in the days when books and journals needed to be printed and distributed to libraries and subscribers, the ownership of publishing houses still made some sense. But today there is no satisfactory answer to the question of why the scientific community still needs those guys at all. They are sitting on their property rights, and all they have to do to fill their pockets is hold out their hand. There are some tasks which could justify the existence of corporate publishers even in the digital age, like proof reading, formatting etc., but that work usually dumped on their customers, too: That's all done by precariously employed junior researchers, who, to get their own dissertation published as an entry ticket into an academic career, are generously allowed to put a four-figure printing fee on the table to relieve the publisher of even the remotest trace of distribution risk. "Rent seeking" is, I believe, the proper economic term for this business model of monopolists, protection racketeers and corrupt politicians.

Of course, every academic knows all this from her own painful experience. But I have to say, my journalist's eyes were popping out of my head when I realized how this business is working. Especially since we here at Verfassungsblog put out our stuff for free and universal access AND, unlike the publishers, regularly invest a lot of editing work into our posts.

It's obvious that science can't put up with that sort of thing forever. For *loyalty* there is no reason, and what happens when the publisher, in its supposed power, also plugs shut the *voice* option, could be seen this week in the venerable European Law Journal. For some time now, this has been owned by the Wiley publishing group, and now they have apparently overdone their rent-seeking. When the publisher insisted on keeping the staffing and decisions of the Editorial Board under its control, the Editorial Board, led by the editors HARM SCHEPEL and JOANA MENDES, decided to quit and withdraw from the European Law Journal in one fell swoop.

This decision is backed by virtually all European law scholars, as indicated by the list of subscribers to the solidarity statement of ANTOINE VAUCHEZ, ALESSANDRA ARCURI and FRANCESCO COSTAMAGNA. The editorial boards of EuConst, ELR and MJECL, three also very renowned journals in European law, have also declared their solidarity. Two of the biggest names in the business, JOSEPH H.H. WEILER and GRÁINNE DE BURCA, have immediately declared their support to the ELJ editors and made it very clear what they would think of people in the field who might compromise that decision and cooperate with Wiley.

I asked Wiley if they cared to comment, which they did:

We are saddened by the decision of the editorial board of the European Law Journal to resign. Wiley is engaged in discussions with independent academic advisors as we search for a new editorial team. That team will have the authority to set editorial policy and appoint a new board for this important journal.

Too little, too late, would be my guess. The publisher is now sitting on the empty shell of a once great magazine and will probably have to write off a substantial amount of money which it had paid to the previous owner for the journal. But that should not be our concern. What is more important is that an adequate replacement will be created for the ELJ. I am curious how this will turn out.

As for ourselves: we have a small office for ourselves now. Großbeerenstr. 89, 10963 Berlin is our new address. You'll find Evin and me there on most days. Anna and Sinthiou, usually busy with their day jobs, came to visit yesterday. Whoever wants to drop by is welcome!

Before I close, let's pass the hat around. A contribution to our upkeep is, as always, greatly appreciated. We are not a publishing behemoth, definitely not, but we have fixed costs too. Three cheers to our now 275 Steady sponsors, who are the backbone of our crowdfunding! This is the premium option, so to speak, which we recommend to anyone



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All the best,

Max Steinbeis



## While you are here...

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All the best, *Max Steinbeis*

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SUGGESTED CITATION Steinbeis, Maximilian: *This is not a drill*, *VerfBlog*, 2020/2/07,

<https://verfassungsblog.de/this-is-not-a-drill/>.

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